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How fundamental is the right to strike?

'We have been told that our right to strike is fundamental but not as fundamental as free movement of services.'

> John Monks, general secretary of the European Trade Union Confederation (ETUC) to the social affairs committee of the European Parliament, 26 February 2008.

Europe's trade unions have demanded a legal boost to their right to strike following recent EU court judgements with implications for workers' rights across the Union. They warn that if their fears that free market principles will take priority over Europe's social protection laws are not allayed then ratification of the EU's Lisbon Treaty – currently ongoing across the bloc – may be jeopardised.

But should the proposed Lisbon Treaty come into force we would rely on the European Court of Justice (ECJ) to rule in favour of citizens or workers if a dispute arose between them and their government regarding the interpretation of any of the measures proposed in the Charter of Fundamental Rights. The Charter includes in its articles a 'right to strike'. The Court would become the forum of last resort, and its findings would have force throughout the European Union. However, the ECJ has already made it clear in at least two cases that:

> 'the fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market ...'[1]

and in a later case it stated that:

> 'it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation

[1] Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, C-5/88, summary, § 2, and grounds, § 18.

of the market ...'[2]

It is clear from these precedents that the 'fundamental rights' that would be conferred on us by the Lisbon Treaty would not be fundamental at all but could be varied or restricted in the interests of a 'common organization of the market' or to advance 'objectives of general interest pursued by the Community', a point that trade union leaders such as Mr Monks will not acknowledge as they persist in their unqualified support for the Charter.

In the Vaxholm case, the ECJ ruled that Swedish unions had breached EU law by forcing a Latvian company to observe local pay deals, while the verdict in the Viking case suggested that unions cannot strike against firms moving from one member state to another due to lower wages. 'We think these cases are of massive importance to the trade union movement', said Mr Monks. He argued that the Vaxholm judgement has restricted the existing unions' right to strike by preventing them from 'going beyond a minimum level' of pay demands when bargaining with foreign employers. The ETUC leader pointed out that while judges had referred to the EU's principles of free movement of services and establishment, their rulings could legally introduce a 'licence for social dumping'.

The Danish opposition has asked the country's government to seek guarantees on collective bargaining rights system before the Lisbon Treaty is ratified. 'With the Vaxholm case, the EU runs over the union right to place a company in blockade when Eastern workers get too little in their wage bags', Danish MEP Ole Christensen said. Swedish MEP Jan Andersson questioned the political role of unelected ECJ judges: 'The Court takes decisions which have political consequences, but they [the judges] are never held politically accountable'.

Reviving the 'country of origin' principle

The verdict in the Vaxholm case has practically reaffirmed the most controversial element of the hugely controversial EU services directive, held partially responsible for the French rejection of the EU Constitution. Its core tenet was the 'country of origin' principle under which firms could provide services in other EU member states under the same pay and social rules as in the country where they are based.

According to Jonas Malmberg, professor of law at Uppsala University, the ECJ has re-introduced the provision through its Vaxholm judgement by referring to a 'principle of

[2] *Kjell Karlsson and Others,* C292/97, grounds, § 45.

minimum protection'. Swedish MEP Jan Andersson echoed similar concerns: 'If it becomes common that a country can go in and compete with much lower salaries, all hell will break loose' he said, pointing out that future EU enlargements could bring in countries with even lower salaries than the 2004 newcomers.